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ABSTRACT

In 1996 the Aid to Families with Dependent Children program was replaced with a federal block grant program called Temporary Assistance for Needy Families (TANF), which imposed time limits and work requirements on welfare recipients. The welfare legislation placed a lifetime ban on TANF and food stamp benefits for convicted drug felons, although states were allowed to opt out or modify the ban if they chose. This study attempts to evaluate the issue and project the likely impact on needy families in San Francisco, CA, where the state has not only opted into the federal provision, but has also excluded those who are disqualified from TANF by the federal ban from receiving state General Assistance benefits. According to the assessment, the drug felony provision will unquestionably have a disproportionate effect on women, the majority of adult TANF recipients, and the new provisions will also be systematically biased against racial minorities. It will increase state costs, especially for foster care and criminal justice, and it will result in decreased treatment opportunities for convicted drug addicts. A survey of the practices of other states shows that 32 opted in, 8 opted out, and two modified the provisions in some way. Five states excluded those convicted of drug sales, but not possession, and two states allowed TANF and food stamps for drug felons, with payments made to a third-party vendor. Recommendations are made to ease the impact on San Francisco families, centering on modifying the ban, changing prosecution policies, and granting local public assistance to parents excluded from the state program. (SLD)

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Double Jeopardy:

An Assessment of the Felony Drug Provision of the Welfare Reform Act

Written by Rukaiyah Adams, David Onek and Alissa Riker

I. Introduction

On August 23, 1996, President Clinton signed into law a massive dismantling of the nation's welfare system. The 61-year-old Aid to Families with Dependent Children (AFDC) program was repealed and replaced with a federal block grant program called Temporary Assistance for Needy Families (TANF), which imposed time limits and work requirements on welfare recipients.

Section 115 of the federal welfare legislation placed a lifetime ban on TANF and Food Stamp benefits for convicted drug felons. The drug felony provision was sponsored by Senator Phil Gramm and thus is sometimes referred to as the Gramm Amendment. Although Senator Gramm offered little official justification for the provision, it was introduced and ratified with bipartisan support within minutes.[1] The federal provision allowed states to opt out of or modify the ban if they so desired.

The California legislature passed its version of the drug felony provision in 1997, in tandem with CalWORKS, its comprehensive welfare reform legislation. California not only opted in to the federal provision banning persons convicted of drug related felonies from TANF and Food Stamps, but went further by also excluding those who are disqualified from TANF by the federal ban from receiving state General Assistance (GA) benefits. The California ban applies to all persons convicted of a drug felony after December 31, 1997.

1. 142 CONG. REC. No 109, Sec.s498 (daily ed. July 23, 1996).

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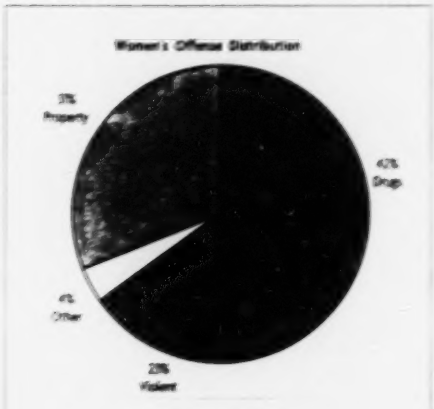
This elimination of a safety net for drug convicted persons who are also parents will prove costly to counties. The director of San Francisco's Department of Human Services, Will Lightborne, has stated that the drug felony provision constituted the most unfair aspect of the CalWORKS legislation.

This study attempts to evaluate the issue and project the likely impact of this policy on San Francisco's needy families. This research examines the following questions:

- Will the provision have a disproportionate impact on women and minorities?
- Will the provision lead to increased state foster care and criminal justice costs?
- Will the provision affect treatment opportunities for persons convicted of drug felonies?
- Will the provision harm innocent children?



Source: CA Department of Corrections. 12/31/97

A. Disproportionate Impact on Women and Minorities

The drug felony provision will unquestionably have a disproportionate effect on women. Women comprise the overwhelming majority of adult TANF recipients,[2] and incarcerated women are more likely than incarcerated men to have a drug felony conviction (see pie charts). In California, the disparate impact is even more striking because single male drug felons can currently receive state General Assistance benefits while mothers convicted of drug felonies cannot.

The new drug felony provision will also be systematically biased against racial minorities. For example, African Americans constitute 12% of the U.S. population, 35% of those arrested for drug possession and 74% of those sentenced to prison.[3]

2. Mark R. Rank, *Living on the Edge: The Realities of Welfare in America* 47 (1994).
3. Steven R. Donziger, Edt., *The Real War On Crime* 38 (1996).

Since the legislation has only been in effect since January of 1998, it has only begun to affect Californian families. However, the impact of this law is highlighted by the following case example. Ms. Latasha Isaac, a recovering addict, turned her life around with the benefits she received after her drug conviction - benefits that the drug felony provision would have denied her.

Ms. Isaac, the youngest of nine children, was born and raised in Stockton, California, where she lived with her mother and siblings. As a child and teenager, she avoided trouble and was a good student. When Latasha was sixteen, her mother died of cancer. Shortly thereafter she started getting into serious trouble, became pregnant and dropped out of high school. Within time, Latasha found herself responsible for two children while fighting a cocaine addiction. She eventually lost her children to temporary state custody until she entered a treatment program. Although she was able to reunite with her children, Latasha did not finish the program and relapsed. As she put it, "At that point everything went downhill." Latasha had no job experience and was not receiving any public assistance. Her addiction drove her to sell crack to support her drug habit and to make a modest living for her children. This also led to a number of arrests for drug related offenses. By this time she had moved to San Francisco, and after a period of living out of a car, she met a man who agreed to pay her rent in exchange for holding his drugs.

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According to the Harvard Law Review:

> Denying welfare benefits to drug offenders will ... take a disproportionate toll on African-Americans and Hispanics. Not only are members of these groups already over-represented among the ranks of the poor, but the government officials responsible for enforcing drug laws focus disproportionate attention on African-American and Hispanic communities.... The combination of racial bias in law enforcement and poverty virtually guarantees that the weight of the Gramm Amendment will fall most heavily on African-Americans and Hispanics.[4]

Minorities comprise a disproportionate percentage of drug felons, as well as a disproportionate percentage of welfare recipients. Clearly, this combination means that minorities will be disproportionately affected by the drug felony provision.

B. *Increased State Foster Care and Criminal Justice Costs*

Another impact of the drug felony provision is that it will greatly increase state costs, especially for foster care and criminal justice. Organizations such as the U.S. Conference of Mayors and National League of Cities publicly and adamantly opposed the federal provision, arguing that the provision would have "unintended consequences [that] would shift more of the financial burden of society's safety net to state and local governments."[5]

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4. *Welfare Reform -Punishment of Drug Offenders- Congress Denies Assistance and Food Stamps to Drug Felons. - Personal Responsibility Opportunity Reconciliation Act of 1996*, PUB. L. NO. 104-193, S 115, 110 STAT. 2105, 110 HARV. L. REV. 983, 988 (1997).
5. "Convicts Could Lose Public Aid," *The Des Moines Register*, July 25, 1996, page 3.

State foster care costs will increase due to the drug felony ban. It will be difficult for a mother returning from prison to obtain a job because of her criminal record. The ban will increase the difficulties for these mothers to reunify with their children, since they will not be able to provide them with a stable income and housing. If no relative is available, these children will wind up in foster care. According to the Urban Institute: "Since a large number of families served by child welfare agencies have substance abuse problems, this provision may make it difficult for substance-abusing parents to obtain the financial resources necessary to care for their children. If child welfare agencies are unable to keep substance-abusing families intact, foster care and adoption expenditures will increase."[6]

The estimated number of persons who received AFDC in San Francisco in 1995: 37,673, which includes 12,730 adults and 24,943 children. 85% of these recipents were people of color, as were 80% of those receiving Food Stamps and SSI.

Source: California Department of Social Services 1995

In addition, children who are placed with a mother who does not receive adequate benefits will be at increased risk of neglect or abuse. This will lead to the children being placed in foster care after draining yet more state resources with neglect investigations. Nancy Young of California State University at Fullerton, who specializes in welfare and substance abuse issues, explained that "when these mothers' benefits are reduced, and they can't feed and house their kids, that's neglect. The implications are enormous for the child welfare system."[7]

The City and County of San Francisco's foster care system is presently under court scrutiny due to its disproportionately high percentage of out-of-home and out-of-county placements. Clearly, the drug felony provision will exacerbate San Francisco's struggle to reunite families.

Drug-abusing women offenders constitute one of the fastest growing segments within the criminal justice system, while few receive treatment in custody or in the community. Many are also single parents who are deterred from seeking treatment because few programs provide accommodations for infants and children.

Source: National Institute of Justice, Drug-Abusing Women Offenders: Results of a National Survey. October 1994

Another major state cost that will increase due to the drug felony ban is criminal justice costs. The situation facing a mother paroling from prison may be quite dire: having a drug addiction but being unable to receive treatment, or

6. Robert Green and Shelley Waters, *The Impact of Welfare Reform on Child Welfare Financing*, Washington, DC: The Urban Institute (1997).
7. Carol Jouzaitis, "Welfare Law Leaves Drug Addicts Little Recourse," *Chicago Tribune*, April 1, 1997, page 4.

Soon after, Latasha was arrested for drug possession. Although the Court agreed that a treatment program was the preferred alternative to a jail sentence, there were no available slots and she served her sentence in custody. After her release, she states: "I figured (that) if I couldn't get help while I was in jail, I wasn't going to get it while I was out." She again turned to dealing to support herself and her children. After hustling to pay each night for hotels and fearing another arrest, she contacted a treatment program and was put on the wait list. However, she was arrested again for possession before she could enter treatment. This time her probation officer recommended that she be sent to prison as a repeat offender, but fortunately, the Judge disagreed and gave Latasha one last chance.

As she put it, "I finally got honest with myself and others, I mean real dirty honest." Latasha completed a rigorous treatment program at Jelani House which enabled her to reunite with her young children. AFDC assistance provided the income necessary to survive during this difficult transition. "To get treatment, I needed an income, I didn't come from a rich family, I needed AFDC to get me into the program. It helped me a great deal" Soon after, Latasha started to volunteer at the Family Rights and Dignity Project. She proved to be such an asset that she was offered a paid position as an outreach advocate for low income families. "I can relate to single parents trying to make it, I've been there."

to find a job because of the drug felony on her record, or to receive welfare or Food Stamps for herself, and having hungry children to feed. Some women may turn to crime to support their children and themselves. Others may return to drug use to escape the pressure of their situation. Nancy Young states that "we're going to have to address those addiction issues to get people self-sufficient, or we're going to see them winding up in jails...."[8]

Society pays for a mother's return to crime and drugs in many ways: for the costs of the crimes committed, for the costs of reincarcerating the mother, and for the costs of placing the children in foster care if no family members are able to take them in. As one commentator put it:

> Without any support services for ex-drug offenders immediately after their release from prison, we can expect recidivism to skyrocket. That means more and more taxpayer dollars for law enforcement, the legal system and prisons, more property loss, and more victims.[9]

C. *Decreased Treatment Opportunities*

Convicted drug addicts need treatment so that they will not return to a life of drug use and crime upon their release from prison. The drug felony provision will make it far more difficult for them to receive treatment after their release. Many residential treatment programs depend on welfare programs to help defray the cost of room and board.[10] The California Association of Addiction Recovery Resources (CAARR) recently conducted a survey of fourteen residential treatment programs to find

8 Jouzaitis, supra.
9. "Deny Aid to Those Who Need It!" *The Des Moines Register*, August 7, 1996, page 8.
10. Legal Action Center, *A Fact Sheet for Policy Makers - Welfare Reform: Implementing Drug Felony Conviction Provisions*. Washington DC: Legal Action Center (1996).

out the extent to which the programs used benefits to defray their costs.[11] While the survey is limited by its small sample size, it clearly shows that at least some residential treatment programs will be gravely affected by the drug felony provision. The survey found that, overall, 69% of the programs' food expenses were covered by Food Stamps – including one program that had 100% of its food expenses reimbursed by Food Stamps. CAARR estimated that "the projected loss to these homes should Food Stamps not be available is $547,884 or $705 per bed per year."[12] The survey also found that 14% of residents used state or federal welfare grants to pay for services – including 95% in one of the programs.

A survey of residential programs within the California Association of Addiction Recovery Resources found that 69% of food expenses were reimbursed through food stamps. The projected loss to these programs will amount to $705 per bed per year.

Source: Recovery Home Survey: Utilization of Food Stamps and Welfare Grants.

The loss of Food Stamps and state GA benefits will have far greater consequences for most residential treatment programs than the loss of TANF benefits. This is because adults are eligible for TANF only if they live with their children, and most women in residential treatment centers do not live with their children. These women help defray the cost of their treatment with Food Stamps and GA, but not with TANF. Residential programs that serve women and children, however, can and do use their clients' TANF benefits to help pay for their treatment. These innovative parent-child programs – such as the one that Latasha Isaac, who is profiled in this report, participated in – will thus be especially hard hit by the drug felony provision.

The CAARR survey shows that treatment programs will lose a significant portion of their budgets as a result of the drug felony ban. According to Linda Wolf Jones, Executive Director of Therapeutic Communities of America, "these programs are able to operate at a low cost by maximizing whatever benefits their clients are eligible to receive."[13]

In August of 1997, 2,225,893 Californians were TANF recipients, more than twice the number of any other state.

Source: Administration for Children and Families.

11. California Association of Addiction Recovery Resources, *Recovery Home Survey: Utilization of Food Stamps and Welfare Grants*, January, 1997.
12. *Id.*
13. "Addicts With Felony Convictions Take Hit In Welfare Bill," *Alcoholism and Drug Abuse Week*, August 5, 1996, page 1.

Table 1: Drug Felony Provision State By State Breakdown[14]

State	Opted In	Opted Out	Modified
Alabama	X		
Alaska	X		
Arizona	X		
Arkansas			X
California	X		
Colorado			X
Connecticut		X	
Delaware	X		
Florida			X
Georgia	X		
Hawaii		X	
Idaho	X		
Illinois			X
Indiana	X		
Iowa			X
Kansas	X		
Kentucky	X		
Louisiana	X		
Maine	X		
Maryland	X		
Massachusetts	X		
Michigan			X
Minnesota			X
Mississippi	X		
Missouri	X		
Montana	X		
Nebraska	X		
Nevada	X		
New Hampshire		X	
New Jersey	X		
New Mexico	X		
New York		X	
North Carolina			X
North Dakota	X		
Ohio	X		
Oklahoma		X	
Oregon		X	
Pennsylvania	X		
Rhode Island			X
South Carolina	X		
South Dakota	X		
Tennessee	X		
Texas	X		
Utah		X	
Vermont		X	
Virginia	X		
Washington			X
West Virginia	X		
Wisconsin	X		
Wyoming	X		
TOTAL	32	8	10

According to the Legal Action Center, "the provision will make it harder for treatment programs ... to survive financially."[15] Cash-strapped treatment programs are more likely to provide their scarce treatment beds to those who can contribute to the cost of their treatment in some way. This will result in less treatment slots for ex-offenders. According to the National Association of Alcoholism and Drug Abuse Counselors (NAADAC), "loss of access to even this meager funding source may cause a patient to lose treatment opportunities."[16]

D. Harm to Children

Another argument against the ban is that it harms innocent children. In addition to the financial loss of placing children in foster care, there is the huge emotional loss the children face by being separated from their mother and dumped on an overburdened foster care system. This is, of course, also true for children who are neglected due to lack of family resources. As Laura Feig of the U.S. Department of Health and Human Services states: "By definition each of these women has kids. But no one considered what will happen to the kids."[17]

14. National Governors' Association Center for Best Practices, Summary of Selected Elements of State Plans for Temporary Assistance for Needy Families (As Of November 20, 1997). Washington, DC: NGA Center for Best Practices (1997).
15. Legal Action Center, *supra*.
16. National Association of Alcoholism and Drug Abuse Counselors, *Position Statement: Treatment Must Be A Fundamental Part Of Federal And State Welfare Programs*. Washington, DC: National Association of Alcoholism and Drug Abuse Counselors (1997).
17. Telephone Interview with Laura Feig, United States Department of Health and Human Services (December 1, 1997).

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III. National Survey

A. *State Decisions: Opting In, Opting Out or Modifying*

The federal welfare bill gave states the right to opt out of or modify the federal bill's drug felony provision. According to the National Governor's Association (NGA) Center for Best Practices, thirty-two states opted in to the provision, eight states opted out, and ten states modified the provision in some way. (See Table 1). The eight states that opted out of the provision completely are: Connecticut, Hawaii, New Hampshire, New York, Oklahoma, Oregon, Utah and Vermont. The ten states that modified the provision in some way are: Arkansas, Colorado, Florida, Illinois, Iowa, Michigan, Minnesota, North Carolina, Rhode Island, and Washington. All other states opted in to the provision.

B. *Types of State Modifications*

Table 2: Drug Felony Provision: State Modifications Requirements for Exclusion from Ban[18]

State	Possession Conviction	Treatment	Payment to Vendor	Drug Testing
Arkansas	X			
Colorado		X		
Florida	X			
Illinois	X			
Iowa		X		
Michigan			X	
Minnesota			X	X
North Carolina	X	X		
Rhode Island	X			
Washington		X		

The types of state modifications to the drug felony ban are listed in Table 2. There were two major ways that states modified the drug felony ban. Five states (Arkansas, Florida, Illinois, North Carolina and Rhode Island) excluded those convicted of drug possession, but not drug sales, from the ban. Five states (Colorado, Illinois, Iowa, North Carolina and Washington) excluded those receiving or having successfully completed treatment from the ban. (Note that in Illinois and North Carolina, recipients had to meet both of the drug possession and drug treatment criteria to be excluded from the ban.)

Two states (Michigan and Minnesota) provided TANF and Food Stamps to all drug felons, but required that payments be made to a third-party vendor. Minnesota also required that drug felons be drug tested to receive their benefits.

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18. National Governors' Association Center for Best Practices, Summary of Selected Elements of State Plans for Temporary Assistance for Needy Families (As Of November 20, 1997). Washington, DC: NGA Center for Best Practices (1997).

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IV. Prospects for Future Legislative Change in California

Like 31 other states, California completely opted in to the drug felony ban. But the fight in California is not over. New legislation could be enacted that would either opt California out of the ban or modify the ban in a variety of ways. Some of the most promising potential modification strategies are discussed below.

A. Treatment Exemption

From 1980 to 1994, the number of women entering US prisons increased by 386%.

Source: Human Rights Watch, Women's Rights Project.

Five states modified the drug felony ban by exempting people who were receiving or had successfully completed treatment from the ban. This type of modification has the greatest chance of success in California. A treatment exemption to the drug felony ban was included in early versions of the California welfare bill, but was not included in the final bill. The fact that this exemption was seriously discussed and debated in California shows that there is some hope for it in the future. Legislators who supported the exemption included both Democrats and Republicans. Some of the supporters of the treatment exemption had personal or family histories of substance abuse and understand the importance of treatment. Their views are thus unlikely to change.

From 1982 to 1991, the number of women arrested for drug offenses increased by 89%.

Source: Federal Bureau of Investigations, *Crime in the United States, 1991.*

B. Possession Exemption

Five states exempted those convicted of drug possession from the ban, prompting one national observer to declare the possession exemption the "most successful" state modification strategy.[19] The possession exemption was discussed in the California welfare reform debate, but was never included in any of the bills. While such an exemption would certainly be an improvement over the current California provision, its impact would likely be limited, according to advocates, because there is not a clear distinction between sellers and users. The two groups overlap, as many users sell small amounts to support their addictions. This is especially true of female users.[20]

19 *Id.*
20. Malika Saada-Saar, Director, Family Rights and Dignity (November 17, 1997).

C. *Allowing Counties to Opt Out*

There is a strategy that has not, we believe, been used anywhere in the nation that could potentially mitigate the affects of the ban in California and other states with strong county governments. California could modify the ban to allow individual counties to opt out. There is nothing in the federal legislation that would prevent a state from passing a county opt out plan. The modification legislation would state that by default every county in California opts in to the ban, but that in the interest of supporting local control counties can opt out if they pass affirmative legislation explicitly doing so. Legislators might be able to support such a modification because they would have political cover. Legislators could say they opted in to the ban but allowed for local control, both of which are politically popular positions.

A 1991 profile of persons incarcerated in the San Francisco County Jails found:

- **75% of women inmates reported having children.**
- **64% of women were receiving or had received some form of public assistance.**

Source: San Francisco Department of Public Health, *Prisoners as Multi-System Users*

V. Recommendations

A. *Amend the State Law*

State legislative representatives should enact modifications to the drug felony ban. Potential modifications include allowing benefits for those receiving or having completed substance abuse treatment; allowing benefits for those convicted of drug possession but not sales; and allowing individual counties to opt out of the provision altogether.

B. *Work With the San Francisco Criminal Justice System to Immediately Minimize the Negative Impact of the Provision*

The San Francisco District Attorney's office can make the biggest difference in minimizing the negative impact of the drug felony provision because of the enormous prosecutorial discretion it has in deciding who it prosecutes for drug felonies. If a drug offender is not convicted of a drug felony, the welfare ban does not apply to her. The

DA's office can find alternative ways of prosecuting drug offenders that do not leave them with a felony drug conviction on their record.

The DA can have an impact by expanding the use of three existing programs: Drug Court, Mentor Court and Drug Diversion. If a drug offender completes one of these programs successfully, the charges against her are dismissed and no drug felony conviction appears on her record. Unfortunately, eligibility requirements for these programs exclude many women who will be affected by the drug felony ban. Drug Diversion excludes those charged with drug sales, while Mentor Court excludes active substance abusers. Many women fall into both of these categories, since they are selling in order to support their addiction, and are thus excluded from both programs. The DA should change its eligibility requirements so that more women who would otherwise be subject to the drug felony ban will be able to participate in these programs.

In San Francisco in 1995, approximately 950 women were arrested for drug related offenses.

Source: State Attorney General's Office

A proposal put forth by a coalition of community-based agencies calling on the Municipal Court, the District Attorney, the Public Defender and the Adult Probation Department to address these issues, has received support from the Department of Human Services and deserves immediate attention.

3. *Allow Parents Excluded From CalWORKS To Receive Local Public Assistance*

In 1995, 1.5 million people were arrested in the U.S. for drug offenses, and arrests for possession constituted three out of every four drug arrests.

Source: Office of National Drug Control Policy, *Drugs in America: 1980-1995* *Uniform Crime Report.*

San Francisco's Department of Human Services has revised its General Assistance (GA) program. These revisions have resulted in the creation of three new county programs which fall outside the State's mandate to exclude TANF-banned recipients from the State GA programs. Parents excluded from TANF should be allowed to qualify for these three county discretionary programs.

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Cover photo of Latasha Isaac and sons by Robert Gumpert

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